

5 Official Opinions of the Compliance Board 165 (2007)

**NOTICE REQUIREMENTS – CONTENT – OMISSION OF
REFERENCE TO ANTICIPATED CLOSED SESSION, HELD
TO BE A VIOLATION – CLOSED SESSION PROCEDURES
– WRITTEN STATEMENT – BRIEF TOPIC DESCRIPTION
BEYOND PARAPHRASE OF STATUTE, HELD NOT TO BE
A VIOLATION – FAILURE TO POST ON THE INTERNET,
HELD NOT TO BE A VIOLATION – MINUTES – CLOSED
SESSION STATEMENT – INADEQUATE DISCLOSURE,
HELD TO BE A VIOLATION**

July 25, 2007

*Jim Lee, Editor
Carroll County Times*

The Open Meetings Compliance Board has considered your complaint, as supplemented with additional correspondence, that the Carroll County Planning and Zoning Commission (hereafter, “Commission”) violated the Open Meetings Act in connection with a closed meeting held on April 17, 2007. For the reasons explained below, the Compliance Board finds no violation of the Act’s procedural requirements governing the closing of the April 17 meeting. We also find that the closure was within the Act’s exception related to legal advice. However, we find that the minutes of that meeting and other meetings in 2007 did not comply with the Act’s requirement for disclosure, following a closed session, of certain information about the session.

I

Complaint, Response, and Supplemental Correspondence

According to the complaint, the Commission closed a portion of its meeting on April 17 without providing “legitimate reasons to close [the] meeting.” The basis given in the motion to close the meeting was simply “legal advice.” The complaint indicated that the closed session was apparently planned in advance, yet it was not noted on the agenda. When the Commission reconvened in open session, the presiding officer indicated, according to the complaint, that the reason for closure

was to “discuss procedural matters on certain procedures.”¹ Enclosed with the complaint was a copy of the Commission’s minutes of its April 17 open session, described in the complaint as “contain[ing] only a vague reference to the reason for closing.” The complaint questioned “the legality of the closed session, as well as the reasoning given both in closing the session and in reconvening.”

In a timely response on behalf of the Commission, Kimberly Millender, County Attorney, and Terri Jones, Deputy County Attorney, denied any violation. Ms. Millender and Ms. Jones both attended the open and closed sessions on April 17. In their view, the meeting was properly closed when the Commission voted to close the meeting “for legal advice.” According to the response, the reason the agenda did not indicate the closed session was “because the issue that arose necessitating [legal] advice did not occur until moments before the start of the meeting.” As described by the Commission’s counsel, the session was closed to “consult with legal counsel about the role of the alternative member under Article 66B, Section 14.03.” More specifically, the response noted that, during the closed session, “counsel provided advice and interpretation regarding the statutory section ... and answered the questions posed by the Commission. No other topics were discussed and no vote or action was taken ... during the closed session.”

The response indicated that, upon reconvening, the Chairman of the Commission indicated for those in attendance that the session was closed “to discuss ‘some procedural matters.’” However, the response indicated that the record, viewed its entirety, adequately reflected the grounds for the closed session. Enclosed with the response were copies of the agenda, the statement prepared by the presiding officer in closing the session, and the minutes of the April 17 open session, together with a video recording of the open session.²

After we received the Commission’s response, you submitted two followup communications. First, you noted that the written statement prepared when closing the session was not included with the minutes posted on the County’s website, nor was a copy of the statement provided when a copy of the minutes of the meeting was requested. Second, you submitted copies of additional Commission minutes, dated January 16 and March 20, 2007, which you suggested, when considered along with the April 17 minutes, reflected “a pattern of failure ... to adhere to the [Act].” Before our consideration of this matter, we offered the County Attorney’s Office an opportunity to address the additional allegations and we requested clarification on

¹ A recording of the public session is available on Carroll County’s website, http://carroll.granicus.com/ViewPublisher.php?view_id=2#ccpzc.

² The response also indicated that the Commission conducted an additional closed session to consult with counsel during the course of the April 17 meeting. However, the response only addressed the allegations raised in the complaint.

whether the minutes provided were intended to satisfy the disclosure requirements of the Act following a closed meeting.³

In a supplemental response on behalf of the Commission, Ms. Millender and Jones acknowledged that the written statement was not available online, but they have asked staff to make the document available online in the future. The failure to provide a copy at the time a copy of the minutes was requested was attributed to a mere oversight. Staff has been asked to keep the statements with the minutes as part of the official record. Because the Commission considers the written statement to be part of the minutes, it was suggested that, read together, the documents satisfy the disclosure requirements of the Act following a closed meeting.

II

Analysis

A. Notice

According to the complaint, although it appeared that a decision to hold a closed session on April 17 had been made before the meeting, the agenda issued in advance of the meeting failed to indicate that a portion of it would be closed. The Commission acknowledged that the agenda lacked this information. However, according to the response, the need for the closed session was first perceived shortly before the start of the meeting.

Both the complaint and response referred to the “agenda.” The Act does not require release of an agenda, meaning a listing of anticipated items of business, although doing so is a practice we consider commendable. *See, e.g., 4 OMCB Opinions* 168, 172 (2005). What the Act requires is advance notice of the date, time, and place of meetings, and we gather that the Commission routinely addresses the Act’s notice requirements through advance posting of an agenda.

When issuing notice of a meeting, a public body is to advise the public “if appropriate, ... that a part or all of [the] meeting may be conducted in closed session.” §10-506(b)(3).⁴ The phrase “if appropriate” refers to the possibility that,

³ The Open Meetings Act does not specify procedures when a complainant submits a reply to a public body’s response. When this happens, we invite the public body to supplement its response when additional issues are raised, should the public body care to do so.

⁴ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

at the time notice was prepared, the public body or its presiding officer might anticipate the closure. 3 *OMCB Opinions* 8, 10 (2000). If a public body realizes, after notice is given but sufficiently before the meeting date, that it will want to close the meeting or a part of it, the public body normally is expected to issue a revised or corrected notice. 3 *OMCB Opinions* 297, 299 (2003). However, when a decision is not made to conduct a closed session until immediately before the start of a meeting, amended notice is not feasible. *Id.* Relying on the representation of the County Attorney that, in this case, the closed session was not anticipated and consequently advance notice of the closed session was not feasible, we find that no violation occurred.

B. Closed Session Procedures

The complaint alleged that neither the vote to close the meeting nor presiding officer's comments following the session revealed the justification for closure. The response indicated that the record as a whole satisfied the requirements of the Act.

In closing a meeting, a vote must be taken to confirm that a majority of the public body supports convening in closed session. §10-508(d)(1) and (2)(i). Implicit in this requirement is that there be a motion by a member of the public body to close the session. 3 *OMCB Opinions* 209 (2002). However, the Act prescribes nothing about the content of the motion. A bare-bones motion suffices. No matter what is said by the member making the motion, the basis for the closing must be articulated in the written statement prepared by the presiding officer in advance of the closed session. This document must contain "the reason for closing the meeting, including a citation of the authority ... and a listing of the topics to be discussed." §10-508(d)(2)(ii).

Here, the motion to close the meeting simply indicated that the purpose for closure was to receive legal advice. However, the written statement noted, among other information, that the session was closed under §10-508(a)(7), to "consult with counsel to obtain legal advice." Under the caption "Specific Reasons to Close and Topics to be Discussed," the presiding officer recorded "discussion of role of alternative member." Although this is not fulsome, it is more than a mere paraphrase of the statutory exception. We agree with the Commission that this statement satisfied the Act's requirements.⁵

⁵ The complaint criticized the brief oral explanation provided by the presiding officer upon return to the open session. No such oral explanation is required by the Act; therefore, no violation in this respect could have occurred. 3 *OMCB Opinions* 340, 341 (2003).

The written statement is a matter of public record that must be available on request. §10-508(d)(4). The obligation to complete this statement and retain it for one year is distinct from provisions governing minutes. *Compare* §§10-508(d) and 10-509(d) and (e). The Open Meetings Act does not require that this document or minutes be available over the Internet. Thus, the failure to post the document along with the minutes did not violate the Act. However, we commend the Commission's plan to start posting the written statements and to maintain a copy of the statement along with its minutes as a means of facilitating public access.

C. Authorization for Closed Session

The complaint questioned the substantive basis for closure. In our view, however, the Commission clearly was entitled to close the meeting in order to seek advice of counsel about the appropriate role of an alternative member of the Commission under State law. There is no indication that the bounds of the "legal advice" exception were exceeded. We find no violation.

D. Minutes

The Act requires that a public body make certain information available as part of publicly available minutes subsequent to a closed session:

If a public body meets in closed session, the minutes for its next open session *shall include*:

(i) a statement of the time, place, and purpose of the closed session;

(ii) a record of the vote of each member as to closing the session;

(iii) a citation of the authority under this subtitle for closing the session; and

(iv) a listing of the topics of discussion, persons present, and each action taken during the session.

§10-509(c)(2) (emphasis supplied). A public body violates the Act if it fails to provide this information no later than the minutes of the next open meeting. A public body is free to provide the information sooner, by including it in the minutes of an open session on the same date as the closed session. *See, e.g., 5 OMCB Opinions* 86, 92 n. 5 (2006). However, the disclosure must satisfy the Act's requirements. Reliance on documentation prepared in advance of a closed session does not suffice.

As we have previously noted, “Someone looking at the minutes should be able to see, within the confines of the minutes, the required information about the previous closed session.” 3 *OMCB Opinions* 202, 207 (2002).

The complaint noted that the minutes of the April 17 meeting “contain only a vague reference to the reason for closing.”⁶ The minutes, in relevant part, read as follows: “Pursuant to [§10-508(a)(7)], Mr. Baile made a motion, seconded by Mr. Wertz and carried, to close the meeting for the purpose of receiving legal advice. Mr. Baile, Mr. Wertz, Mr. Guerin, and Dr. Slade, voted ‘Aye’ on the motion to close. The Commission entered into closed session. Upon completion of the discussion, the Commission reopened the meeting on motion of Mr. Baile, seconded by Mr. Wertz, and unanimously carried. No action was taken in closed session.” The minutes of the January 16 and March 20 meetings had similar descriptions about closed sessions on those dates.

The Commission argued that the written statements and minutes of each meeting, when read together, disclose the information required under §§10-508(d)(2)(ii) and 10-509(c)(2). We do not agree. The minutes do not explicitly list “the topics of discussion” in the closed session or the “persons present.” Perhaps one may infer that the topic was the same as indicated on the statement, and those present were only the Commission members and the County Attorney. But one purpose of this requirement for the minutes is to enable an interested member of the public to compare the two, in case some variance suggests a discussion beyond the scope indicated in the pre-closing statement. Moreover, the required post-session disclosures must appear in the minutes themselves. Information on the written statement prepared when closing the meeting cannot substitute for the disclosures required in the actual minutes. To the extent that the Commission’s minutes did not include the information required under §10-509(c)(2), a violation of the Act occurred.⁷

⁶ These minutes, rather than later ones, are evidently intended to satisfy the Act’s disclosure requirements about the April 17 closed session. The next set of approved minutes, of the Commission’s meeting on May 15, 2007, simply record the approval of the minutes of the April 17 meeting but contain nothing about the April 17 closed session.

⁷ As mentioned above, the Commission plans to maintain for public inspection a copy of the written statement with the appropriate meeting minutes. Still, the information required by §10-509(c)(2) needs to be in the minutes, even if the statement is appended.

III

Conclusion

We find that the Commission did not violate the Act's procedural requirements in closing the meeting on April 17. We further find that the Commission had an adequate justification for the closure. However, the minutes of this meeting and other meetings identified in the complaint materials failed to fully disclose the information required following a closed meeting.

OPEN MEETINGS COMPLIANCE BOARD

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